Supreme Court, U.S.
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No._____

UNITED STATES SUPREME COURT

THOMAS MITCHELL,
PETITIONER

V

DR. BERNARD KATZ, ET AL.,
RESPONDENTS

"ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT"

"PETITION FOR WRIT OF CERTIORARI"

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30pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court Or Appeals for the First Circuit erred when it affirmed the District Court's decision to deny the plaintiff's motion to dismiss the three motions of the defendants to dismiss the plaintiff's complaint because the defendants' failure to comply with local rule 7.1 (A) (2) of the federal rules of civil procedure?

2. Whether the United States Court Of Appeals for the First Circuit erred when it affirmed the District Court's decision to allow the motion to dismiss Messrs. Leinbach, Mcgrath, Miles and Pfeiffer for lack of jurisdiction?

3. Whether the United States Court Of Appeals for the First Circuit erred when it affirmed the District Court's decision to allow the defendants' motion to dismiss the plaintiff's complaint for failure to state a claim?

4. Whether the United States Court Of Appeals for the First Circuit erred when it affirmed the District Court's decision to deny the plaintiff's motion for A T.R.O. enjoining defendants to render prompt and immediate medical examination, care and treatment to head, and all other injuries received?

5. Whether the United States Court Of Appeals for the First Circuit erred when it affirmed the District Court's decision to dismiss without prejudice Sua Sponte CT Corporation System for plaintiff's failure to effect proper service when proof of proper service was filed with the court?

6. Whether the United States Court of Appeals for the First Circuit erred when it affirmed the District Court's decision to dismiss the petitioner's case?

7. Whether the United States Court Of Appeals for the First Circuit erred when it affirmed the District Court's decision to deny the petitioner a default against Dr. A. J. Ajeena?

No._____

UNITED STATES SUPREME COURT

Thomas Mitchell
V.
Dr. Bernard Katz

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[Each] defendant named in this civil action.

RESPONDENTS

[Note: Past corporate names and misspelled names of Correctional Medical Services, Inc. have been deleted from the list of Defendants-Respondents previously printed, however no Defendants-Respondents have been added nor removed from this civil action through the above deletions of names that are no longer applicable. The above is a list of the proper Defendants-Respondents in this civil action.]

[Note: All respondents are respondents in their official and individual capacities.]

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review this case decided below by the United States Court of Appeals for the First Circuit.

Citations of the official and unofficial reports of the opinions and orders entered in the case by courts or administrative agencies

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The citations of the official and unofficial reports of the opinions and orders entered in the case by courts or administrative agencies listed below are all unpublished. They are (1) order of court dated 7/2/97, docket # 80; (2) order of court dated 7/14/97, docket # 88; order of court dated 7/29/97, docket # 98; order of court dated 11/7/97, docket # 143; order of court dated 1/3/98, docket # 161; order of court dated 3/19/98, docket # 163; report and recommendation dated 6/24/98, docket # 173; Order of United States Court of Appeals dated 5/27/98, docket #175; Endorsed order of court dated 6/24/98, docket --; Endorsed order of court dated 7/31/98, docket --; Endorsed order of court dated 8/3/98, docket --; Order of court dated 8/6/98, docket # 176; Order of court dated 11/24/98, App. # 98-2260; Order of court dated 1/11/99; APP. # 98-2260; Order of court dated 3/15/99, App. # 98-2260; Notice and Opinion of U. S. Court of Appeals dated3/15/99, App.#98-2260; Order of court dated 8/10/99, App. # 98-2260; Order of court dated 8/25/99, App. # 98-2260; Order of court dated 8/26/99, App. # 98-2260; Opinion of court dated 8/31/99, App. #98-2260; judgment of the U. S. Court of Appeals for the First Circuit entered 12/30/99; Denial of request for rehearing entered 2/28/2000; Return of Petition for Writ of Certiorari by the clerk of the U.S. Supreme Court dated May 31, 2000 for non-compliance with the rules of the court together with a statement by the clerk of this court to kindly correct the petition and appendix so that it complies in all respects with the rules of the court and return it promptly so that it may be

docketed. Full text of all orders of court, opinions and directives above are unpublished but are reprinted in the appendix as indexed in the appendix.

The judgment of The United States Court of Appeals for the First Circuit was entered on December 30, 1999. The order of court denying the petitioner's request for a rehearing was entered on February 28, 2000.

STATEMENT OF JURISDICTION

The court has jurisdiction to review this petition with respect to this case, pursuant to 28 U.S.C. §1254 (1).

The notifications required by Rule 29.4 (b) and (c) are being made in conjunction with the filing of this petition.

Constitutional Provisions, Treaties, Statutes, Ordinances, and Regulations involved in this case.

Citations of the Constitutional Provisions, Treaties, Statutes, Ordinances, and Regulations involved in this case are provided below and the pertinent text is set out in the Appendix as indexed.

Title 42 U.S.C. §1983, §1985 (3); Title 28 U.S.C. §1332 et seq. [Diversity of Citizenship] subsections: (a) (1), (2), (3), (4), and (c) (1) A; §1343, §1651, §2201, §2202; United States Constitution, Articles 3 et seq., 4 et seq., 6et seq., 1st, 4th, 5th, 7th, 8th, 9th, 10th, and 14th Amendments to the Constitution; Title 18 U.S.C. §1962, 1964, Civil RICO. 18 U.S.C. §(2) 1961 (1)(B), Par. 1, Page (9), (15), Par. 2 Page. 21; 18 U.S.C. §(2) 1962, Par. 2 Page 3, Par. 2 Page 16; 18 U.S.C. §1962(b-d), Par. 1 page 15, par 2 page 21; 18 U.S.C. §1964, par.2 page 3, par. 2 page 17; 18 U.S.C. 1964 (c), par.

1 page 15, par. 2, page21; 28 U.S.C. §1332 ET Seq. Sub sections (A)(1), (2), (3), (4) and (e) (1)A, par. 2, page 3, alluded 2 as a citizen of a foreign state address and Messrs, Leinback, Miles Pfeiffer and McGrath are defined as citizens of a foreign state, page iii and iv, included to the last sentence of par. 2 page 6, throughout the statements made in par 2 and 3 of page 7 and par 1 of page 9, in par. 2 page, 12, par. 2 page 17; 28 U.S.C. §1341, par. 1 page 15, par. 2 page 17, par. 2 page21; 28 U.S.C. §1343, par.2 page 3, par. 1 page 15, par. 2 page 17, par 2 page 21; 28 U.S.C. 1651 Par. 2 page 3, par. 2 page17; 28 U.S.C. §2201 par 2 page 3, par. 2 page 17; 28 U.S.C. 2202, par. 2 page3, par. 2 page 17; 28 U.S.C. 1254 (1), par. 4 page 2; 28 U.S.C. A, par. 1 page 15, par. 2 page 21; 28 U.S.C. § 2403, par. 3 page 27; 42 U.S.C §1983, par. 2 page 3, par 2 page17; 42 U.S.C §1985, (3), par. 2 page 3, par. 2 page 17; United States Constitution Article 3 et seq., par. 2 page3, par. 2 page 17; Article 4 et seq., par 2 page 3, par 2 page 17; article 6 et seq., par. 2 page 3, par. 2 page 17; 1st Amendment to the Constitution Par. 2 page 3, par. 2 page 17; 4th Amendment to the Constitution Par. 2 page 3, par. 2 page 17; 5th Amendment to the Constitution Par. 2 page 3, par. 2 page 17; 7th Amendment to the Constitution Par. 2 page 3, par. 2 page 17; 8thAmendment to the Constitution Par. 2 page 3, par. 2 page 17; 9th Amendment to the Constitution Par. 2 page 3, par. 2 page 17; 10th Amendment to the Constitution Par. 2 page 3, par. 2 page 17; 14th Amendment to the Constitution Par. 2 page 3, par. 2 page 17; Fed. R. Civ. P. 4 (C) (2) (A), Par. 2 page 3, par. 2 page 11, par. 3 page 15, par. 1 page 25; Fed. R. Civ. P. 4 (C)(A), Par. 2 page 3, par. 2 page 11, par. 3 page 15, par. 1 page 17; Fed. R. Civ. P. 4 (c)(c), Par. 2 page 3, par. 2 page 11, par. 3 page 15, par. 1 page 17; Fed. R. Civ. P. 4 (C)(A), Par. 2 page 3, par. 2 page 11, par. 3 page 15, par. 2 page 16, par. 1 page 17; Fed. R. Civ. P. 4 (c)(2)(A), sub par (A), (B) or (C), par. 2 page 3, par. 2 page 11, par. 3 page 15, par. 2 page 16, par.1 page 17; Fed. R. Civ. P. 4 (d)(1) or (d)(3), Par. 2 page 3, par. 2 page 11, par. 3 page 15, par. 2 page 16; Fed. R. Civ. P. 4(C) – (ii) par 2 page 3, par. 2 page 16; Fed. R. Civ. P. 9(b), par. 1 page 15, par. 2 page 21; Fed. R. Civ. P.55(a), par 2 page 3, par 1 pate 17; Local Rule 7.1 (A), (2) of the Fed. R. Civ. P.

par. Page 3, par. 1 page 5 par. 1 page 14, par. 1 and 2 page 18, par. 1 page 22; Fed. R. Civ. P. 16(b), par. 1 pages 5; M.G.L ch. 181, Par. 2 pages 19; 28 U.S.C § 1291, (statue allowing the U. S. Court of Appeals to hear the appellant 's appeal in this case)). It is found in par. 2 page 2 of the brief of the appellant.

Statement of the Case

Petitioner, Thomas Mitchell, a person in state custody received several serious injuries in an accident caused by another inmate while imprisoned at MCI-Concord. Due to lack of proper medical examinations to determine the extent of his injuries and lack of proper medical care for other injuries he suffers much unnecessary pain, emotional stress, known permanent impairments and possible future impairments. He, in an effort to obtain proper medical examinations, care and monetary damages for violation of his civil rights and losses to his business and property, both present and future to the extent that can be calculated, filed a complaint, Pro Se in the United States District Court for the First Circuit as the defendants were from different states. He considered the decisions of the District Court were improper, and appealed its decisions to the United States Court of Appeals for the First Circuit. On December 30, 1999 the Court of Appeals issued judgment affirming the decisions of the District Court.

It appeared the decisions made by the United States Court of Appeals [hereinafter referred to as "Court of Appeals"] were improper and some decisions were contrary to past decisions it had made where the matters to be decided were the same as in this case. Other decisions it made decided an important federal question in a way that not only conflicts with relevant decisions of the majority of the Justices of the United States Supreme Court but challenges their decision, holdings and statements of Justice Scalia in Carlisle v United States, 517 US 134 L.ED 613 S. Ct. (94-9247).

The petitioner herein is petitioning the United States Supreme Court for Writ of Certiorari requesting this Court to

review the United States Court Appeal's affirmation of certain decisions made by the United States District Court for First Circuit [hereinafter referred to as the "District Court"] which these affirmation he feels are bias, contrary to past decisions of the Court of Appeals and United States Supreme Court as will be described more fully later in this petition. Facts material to consideration of the questions presented for review are listed below in the same numerical order as above presented.

1. Facts material to consideration of the first question are: (1) The Court of Appeals should not have affirmed a decision of the District Court it knew or should have known the District Court had no inherent power to make. In Carlisle v United States, (supra) Justice Scalia, speaking on behalf of the majority of the Justices of the Supreme Court in their concurring opinions and holdings said: "Whatever the scope" of the power [referring to the inherent power of the District Court] it ends where the Federal Rules begin. "Caselaw does not establish any 'inherent power' to act in contravention of applicable Rules". "Federal Courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." These Rules are intended to provide for the just determination of every proceeding. Justice Scalia further said: "District Judges may regulate their practice in any manner consistent with Federal Law, these Rules and Local Rules of the court. (2) The clarity of this local rule 7.1(A)(2) makes it impossible not to fully understand it and comply with it; (3) This rule stands entirely on its own and refers to all motions not just certain motions filed at a particular stage of litigation. The exemptions stated in Fed. R. Civ. P.16(b) are not applicable to any other rule and are stipulated for a certain stage of litigation only. Local rule 7.1(A) (2), of the Federal Rules of Civil Procedure for the District of Massachusetts, the Rule involved in this question states: "No motion shall be filed unless counsel certify that they have conferred and have attempted in good faith to resolve or narrow the issue." (4) The petitioner sent a letter to the attorneys of record in this case two different times, requesting a meeting to narrow the issues but the Defendant's lawyers refused to meet unless the

petitioner met for the purpose of releasing the defendants from this civil action. Full text of letter reprinted in appendix. The petitioner states, upon a proper habeas corpus being sent to the institution where he resides prior to the date the meeting was scheduled for he would be transported to any court for legal purpose. A meeting could be arranged in one of the conference rooms of a courthouse near the offices of the attorneys for the respondents for the purpose of complying with the above rule on any business day. State transportation is provided for an inmate to all courts and medical facilities on a daily basis at no cost to either party thus no inconvenience or hardship is incurred by anyone. No request for a meeting either in person or by telephone has ever been received by the petitioner from any respondent or their attorney.

2. Facts material to consideration of the second question are: The medical contract between Correctional Medical Services, Inc. [hereinafter referred to as CMSI] and the Department of Correction [hereinafter referred to as DOC] was negotiated by Mr. William G. Leinbach with assistance from the above respondents who advised him of the requirements Correctional Medical Services, Inc. [known as ARA Health Services, Inc. d/b/a Correctional Medical Systems at the negotiations and signing of the Medical Contract] wanted in this contract if it was to be accepted by this entity and further advised him of the costs and profit they would agree to. They advised and assisted Kevin McGrath in the design and implementation of the policies concerning the provisions of medical care that was to be administered. The contract that was accepted and agreed to by the officers of the medical provider contained a Forum Selection Clause, which required all claims arising under the contract to be filed in the state or federal courts within Massachusetts. It has been held that parties to an agreement that contains a Forum Selection Clause can be said to have waived their right to challenge the designated forum's jurisdiction over them. In this contract the respondents agreed together with DOC to make all reasonable efforts to cooperate with each other in the defense of any litigation

brought by any person not a party to this agreement including suits that concern services, the program, or by this agreement. It is stipulated that the provider and personnel shall appear at court for various court hearings and such civil litigation matters as are deemed appropriate by the Associate Commissioner for Health Services and the program director on a case by case basis. The respondents agreed to the above terms of the Forum Selection Clause of the medical contract by their written signature on the contract and they as principal officers of CMSI and as such should be held to their agreements.

The contract also states "The provisions of this section [III(F)] shall survive the expiration or termination of this agreement. [Cooperation in Litigation section of medical contract reprinted in appendix, indexed #6] as CMSI is a corporation filed with the Secretary of the Commonwealth of Massachusetts it and its officers must comply with its laws and regulations. The principal and other officers of a corporation filed under the laws of the Commonwealth of Massachusetts must allow the Commonwealth and its courts to have jurisdiction over them. As the principal officers of CMSI agreed to the wording and phrasing of the Forum Selection Clause in the medical contract they must have been aware that if litigation were to commence concerning matters stipulated in the Forum Selection Clause it would be they who negotiated it, agreed to its terms and implemented its policies that would most likely be called to testify in a court or at a hearing in the Commonwealth of Massachusetts where they agreed all litigation should be filed.

Correctional Medical Services, Inc. is considered an artificial person having a legal entity entirely separate and apart from the individuals who compose it and those who make it do as commanded. The Secretary of the Commonwealth approves its by-laws, which control its activities. Its by-laws cannot contain any purpose that is illegal or dishonest as an act of the corporation. As it is inanimate its officers who act on its behalf must control it. Its officers make it perform its acts therefore any deviation from its by-laws is unauthorized. Correction Medical Services, Inc. is being paid according to the terms of its

contract to provide proper medical care to each inmate residing in the Massachusetts Prison System for each day of the inmate's residency in the institutions operated by the DOC, however, proper medical care is not being provided. CMSI policies, set in place by the CMSI respondents controlling medical care must be in accordance with the terms it agreed to in the medical contract. (see appendix index # 7) Deviations from the terms of this contract become an activity of the officers controlling its activities not the corporation. Negotiation of an agreement the corporation does not intend to fulfill or cannot afford to fulfill is not an act of the corporation but rather an act or its officers personally.

Testimony by CMSI employees before the Massachusetts Legislature [reprinted in Appendix index # 8] and affidavits previously filed in this case attest to the improper medical care provided to inmates, an act that cannot be construed to be a lawful act within the by-laws of CMSI and cannot be said to be an act done on the basis of his or her employment by the corporation whether as an officer or other employee, therefore it becomes a personal act and direct involvement in a decision which in this case is causally related to the injurious care being provided to the petitioner [hereinafter referred to as "Mitchell"] which is causing further injury. For the above reasons jurisdiction over respondents, Messrs, Leinbach, McGrath, Miles and Pfeiffer is warranted under the Massachusetts long-arm statute. Their tortuous actions/ inactions are denying Mitchell adequate medical care.

3. Facts material to consideration of the third question are: (1) It has been established that he has suffered a broken wrist and due to improper medical care by Dr. A.J. Ajeena. Physical therapist, Michael Auardi, of Lemuel Shattuck Hospital stated in his written report that Mitchell lost 55% of the range of motion in his left wrist since it was broken. He stated to Mitchell that the loss of range of motion was due to the ace bandage being left on his wrist too long. Dr. Ajeena has contradicted this report after reviewing it and never responded to Mitchell's complaint after personally receiving

it. The ace bandage caused the tendons in Mitchell's left wrist and hand to contract. Some type of medical care will be required to keep the tendons from causing continuous pressure, which is causing internal bleeding in the back of the left hand. Future medical issues may result which would further restrict the use of Mitchell's left hand and wrist. As electronic equipment is essential to Mitchell in his business he must try to retain the use of both hands.

The second claim that could be allowed is the allowance of the T.R.O. requesting proper medical examinations to determine the cause of his blurry vision and instant memory loss, both of which were suffered as a result of the fall he endured at MCI-Concord. Claims for monetary compensation for losses could be scheduled for trial before a competent jury as established losses should be compensated for in a fair way.

4. Facts material to consideration of the fourth question are: At the time Mitchell was sent to the Hospital Service Unit after his fall he should have been completely examined for any injuries he may have sustained. The Physicians Code of Ethics require a physician to completely examine their patient including X-rays to determine the extent of his/her injuries suffered after the patient has been involved in an accident. Mitchell is a heavy built man, at the time he fell he was in his late sixties. This severe fall caused known serious injuries and possible unknown serious injuries especially to his head as his head hit hard on the concrete and steel floor of the second tier. Dr. Angeles, although admitting she never had any experience with the type of injuries Mitchell experienced, should have been aware of her obligations. She was the medical director at MCI-Concord.

Mitchell was required to submit written requests for medical care to CMSI for 59 days before Dr. Angeles allowed an x-ray, which showed that Mitchell was enduring extreme pain because he had 3 broken crushed ribs. The blurry vision and instant memory loss are not painful but they cause emotional stress as Mitchell doesn't know if it will lead to blindness and total loss of memory which would not only

imprison him for the rest of his life but would cause severe losses to his businesses and property.

5. Facts material to consideration of the fifth question are: (1) F.R.C.P. 4(c) (2)(A) states: "A summons and complaint shall, except as provided in subparagraphs (B) and (C) of this paragraph, be served by any person who is not a party and is not less than 18 years of age". F.R.C.P. (c)(c) states: "A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule, (ii), by mailing a copy of the summons and of the complaint (by first class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, return receipt requested, a copy of which was filed in the District Court. Receipt of service by the above acknowledgment was not received by Mitchell but he did receive a letter on CT Corporation stationary signed by Michelle Larkin, Process Specialist, stating the copy of the summons and complaint had been received by CT Corporation System and was being sent back to Mitchell requesting advice as to whom to send it to. [text of letter reprinted in App., index # 9] Mitchell sent back a letter stating CT Corporation System was the Defendant to whom the copy of the summons and complaint was intended. (All letters have been filed in the District Court) [test of letter reprinted in App., index #10]. The summons and complaint was delivered by [a mailman], a person who is not a party to this civil action and was at least 18 years of age when he delivered the copy of the summons and complaint. (Letter from the U.S. Postal Service attesting to mailman's age filed in record.)

Delivery of the copy of the summons and complaint was addressed to Edward Gwisdalla, CT Corporation System as he is the agent for CT Corporation, 2 Oliver Street, Boston, MA 02108. Valerie Johnson received it the second time. She is a process specialist and a person who normally

receives service of process at the office of CT Corporation System and the person who signed the second letter stating CT Corporation had received a copy of the summons and complaint. She also receives service of process on behalf of other corporations. This defendant is especially important as it is listed as the Clerk of Correctional Medical Services, Inc. and as required is the only clerk of this corporation with a Massachusetts residency. It is the only clerk that could certify the vote of Correctional Medical Services, Inc. as it applies to contracts as Massachusetts requires the clerk of a corporation to live in the Commonwealth. Edward Gwisdalla, agent for CT Corporation System and addressee named on the package containing the copy of the summons and complaint which was delivered to 2 Oliver Street, Boston, MA 02108. CT Corporation System sent the second copy of the summons and complaint back to Mitchell together with a letter on CT Corporation System stationary signed by Valerie Johnson, Process specialist stating she was returning the copy of the summons and complaint. [Valerie Johnson] is a general agent who receives service of process at CT Corporation System] A copy of this letter was filed with the court and [the text of this letter is reprinted at App. # 11]. There is much proof that service of process was properly made to CT Corporation System thus making the decision of the lower courts seem bias and improper. CT Corporation was certainly notified of the civil action in which it is a defendant; has acknowledged receipt of each copy of the summons and complaint in the letters it sent to Mitchell an both copies were served properly as above stated. The above letters form CT Corporation System and from Mitchell to CT Corporation System have been timely filed with the court and the text of each reprinted in the appendix. No answer has ever been received from the above corporation nor has an answer to Mitchell's complaint ever been filed in the court even though Mitchell tried in every way to explain the need for an answer. A default against this defendant is warranted, not a dismissal. The court should not defend a defendant when it is not warranted. Rule 4 has been complied with as required.

6. Facts material to consideration of the sixth question are: The defendants motions to dismiss Mitchell's complaint should have been dismissed as they were not filed in compliance with local rule 7.1(A)(2) of the Federal Rules of Civil Procedure for the District of Massachusetts which the majority of the Justices of the United States Supreme Court state cannot be circumvented. Carlisle v United States, (supra). Local rule 7.1(A)(2) [Motion Practice] states: "No motion shall be filed unless counsel certify that they have conferred and have attempted in good faith to resolve or narrow the issue." Allowance of a motion that was not filed in accordance with the above local rule cannot be allowed.

In Carlisle v United States, the Justices of the U.S. Supreme Court state: Federal Courts have no move discretion to disregard the rule's mandate than they do to disregard constitutional statutory provisions." Also, in New England Data Services, Inc. v Becher 829, F.2d 286, 288 (1st Cir. 1987) the Court of Appeals, Torruella, Circuit Judge, held that: the rule requiring a party to plead fraud with particularity applies to civil RICO actions; (2) in a civil RICO mail fraud and wire fraud case, dismissal should not be automatic once the District Court determines the rule has not been satisfied if the specific allegations make it likely that the defendant used interstate mail telecommunications facilities and that the specific information as to use is likely to be in the exclusive control of the defendants; and (3) the District Court abused its discretion in dismissing the complaint without permitting further discovery.

FEDERAL CIVIL PRODCEURE –1789

District Court should not have dismissed without further discovery, civil action under Racketeer Influenced and Corrupt Organization Act alleging mail fraud and wire fraud where plaintiff provided outline of general scheme to defraud and established inference that mail or wire fraud was used to transmit scheme; requiring plaintiff to plead time, place, and contents of communication between defendants, without allowing some discovery in addition to interrogatories, was unreasonable. 18 U.S.C. §§1341, 1343, 1961(1)(B), 1962(b-d), 1964(c); Fed. R. Civ. Proc., rule 9(b), 28 U.S.C.

7. Facts material to consideration of the seventh question are: 4(c)(2)(A) states: A summons and complaint shall, except as provided in subparagraphs (B) and (C) of this paragraph, be served by any person who is not a party and not less than 18 years of age. F.R.C.P. rule 4(c)(C) states: A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule (ii) by mailing a copy of the summons and of the complaint (by first class mail, postage prepaid) to the person to be served by mailing a copy of the summons and of the complaint (by first class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3). Subdivision (d)(1): Upon an individual other than an infant or an incompetent person, by delivering a copy of summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or by leaving copies there of at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

The defendant, Dr. A. J. Ajeena was served a copy of the summons and of the complaint by first class certified mail both at his place of business and at his usual place of abode. The plaintiff received no answer and a second copy of the summons and of the complaint was delivered to the defendant personally by a person who is at least 18 years of age and not a party to the action. As rule (C)(ii) states, "if no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3). Rule (A)

states: "A summons and complaint shall be served by any person who is not a party and not less than 18 years of age. There are no stipulations stating who "any person" must or must not be therefore a mailman who is at least 18 years of age and not a party may serve a copy of a summons and complaint to a defendant after no acknowledgement of service under Rule 4(C)(ii) has been received by the sender. After complying with Rule 4(C)(ii) the sender received no reply or acknowledgment and he had a copy of the summons and complaint served in compliance with Rule 4(c)(A) to Dr. A. J. Ajeena personally and a receipt signed by Dr. A. J. Ajeena attesting to his receipt of the copy of the summons and complaint, a copy of which has been filed with the Court. As no reply or answer to the summons and complaint has ever been filed or received by the Mitchell the court must allow the petitioner a default against this defendant pursuant to Rule 55(a) of the F.R.C.P. Copies of medical reports containing Dr. A.J. Ajeena's signature have been filed with the court so that his signature on the return receipt receiving the copies of the summons and complaint may be ascertained. A copy of a letter from the U.S. Postal Service ascertained being filed explaining and proving delivery by a Postal Service Employee is in compliance with F.R.C.P. Rule 4(d)(1). [A copy of the text of the letter from the U. S. Postal Service is reprinted in App. # 12].

The Court Of Appeals erred when it affirmed the decision District Court which showed prejudice as its decisions is contrary to the Federal Rules of Civil Procedure. The petitioner is filing in the appendix a copy of a medical report signed by Dr. A. J. Ajeena so this court may examine the signature against the signature of Dr. A. J. Ajeena on the return receipt for the copy of the summons and complaint to insure it was he who received the copy of the summons and complaint.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The basis for Federal Jurisdiction in the Court of First Instance is established under Title 42 USC §1983, §1985(3) Title 28 USC §1332 et seq., subsections: (a) (1), (2), (3), (4),

and (c) (1) A; §1343, §1651, §2201, §2202; United States Constitution, Articles 3 et seq., 4 et seq., 6et seq., 1st, 4th, 5th, 7th, 8th, 9th, 10th, and 14th Amendments to the Constitution; Title 18 U.S.C. §1962, 1964, (Civil RICO).

DDIRECT AND CONCISE ARGUMENT AMPLIFING THE REASONS RELIED ON FOR ALLOWANC OF THE WRIT

1. The petitioner, Thomas Mitchell, is relying on the allowance of a Writ of Certiorari because affirmation by the United States Court of Appeals of the District Court decisions in this case seems somewhat prejudice. Mitchell avers he has proved proper service of process to Dr. A. J. Ajeena and CT Corporation System in compliance with the F.R.C.P.; he avers the decision to deny his motions to dismiss the motions of the defendants to dismiss his complaint because of their failure to comply with Local Rule 7.1(A)(2) of the F.R.C.P. conflicts with and challenges the decisions and holdings of the justices of the United States Supreme Court in Carlisle v United States, 517 US 134 L.Ed 613 S.Ct. (No. 94-9247).

He avers allowance of the defendants' motions not filed in compliance Local Rule 7.1(A)(2) challenges the authority of the Justices of this Court as the lower courts do not abide by their decisions or holdings. This court must decide if the agreements contained in the "Forum selection clause" can be upheld so that jurisdiction is achieved over the defendants who are parties to this agreement by the courts of the Commonwealth. The issuance of a Writ of Certiorari will allow this court to decide if the agreement between CMSI and DOC is enforceable allowing jurisdiction by the courts of the state if the state is sued and the only intelligent testimony may be had from the parties to the Forum Selection Clause who are from out of state as in the case at bar. It will allow this court to settle this important question of federal law that has not been, but should be, settled by this court as it is of significance to a large professional group of litigators, a large populace of defendants, states and litigators drafting agreements such as the medical contract; it will greatly

reduce the cost of litigation, including in this case, the Commonwealth of Massachusetts; it will allow a decision to be made that will establish the sincerity of the parties to an agreement of this type by providing sanctions for refusal to abide by the agreement.

Large corporations and federal and state government usually include a forum selection clause in contracts assuming it guarantees jurisdiction and availability of the parties to the agreement especially officers of a foreign corporation to appear and testify at hearings and courts as required. It should define the existence or jurisdiction over officers of a foreign corporation, filed as required, [in this case by M.G.L.ch.181] and a party to a long term contract with the forum state [in this case, the Commonwealth of Massachusetts] requiring cooperation between the parties in suits and claims arising out of the [in this case medical contract, its programs, services and products sold] by anyone not a party to the contract commenced in the federal and state courts with the [in this case, the Commonwealth] the courts selected for litigation of all claims and suits by the above. It can decide if the above clause or agreement can be upheld to satisfy jurisdiction of the parties.

In this case CMSI hired men with the qualifications required by the Commonwealth to negotiate the contract, formulate and implement acceptable policies supposedly commensurate with the terms of the medical contract for the provision of proper medical care to inmates as required by DOC to inmates under its care and custody. These men, all officers of CMSI negotiated and agreed to the terms of the Forum Selection Clause and the medical contract. However, four months after the medical contract was signed the officers, Leinbach who negotiated the contract and Forum Selection Clause and McGrath who formulated and implemented the policies concerning the administering of health care were allowed to resign on the same day, four months after the medical contract was signed.

These are the men who would most likely be requested to the issues involved in this case especially to the administration of health care to Mitchell. CMSI is a national managed healthcare provider to prisoners and other persons.

Issues concerning managed healthcare providers are the subject of discussion presently in the United States congress. Most managed healthcare providers are foreign corporations outside of their state of incorporation. The decisions concerning jurisdiction will be cited by thousands of litigators in thousands of cases in the courts of every state and perhaps by counsel representing officers of these foreign corporations if subpoenaed by the federal or state courts or ever congress. As other employees of these corporations would be affected by jurisdictional issues a large portion of the population could be affected by the decisions of this court in this case as will congress in the formulation of future decisions concerning managed healthcare providers. The United States Court of Appeals for the First Circuit has decided the question of jurisdiction in Mitchell's case, however, this decision has not been, but should be, settled by this court as its decision will lessen the cost of litigation for a great portion of the population of the United States, the federal and state courts and government and clarify a very important federal question. This decision is vital to the justice of the federal and state courts of the United States and its territories. Federal and state court time saved would be astronomical, greatly reducing a segment of their caseload.

2. Whether the Court of Appeals affirming the District Court's dismissal of Mitchell's complaint is in conflict with its decision in New England Data Services, Inc. v Becher on the same important matter should be decided by this court. In New England Data Services, Inc. v Becher (supra) Judge Torruella, then Circuit Judge of the United States Court of Appeals for the First Circuit held: "that in a civil RICO mail fraud and wire fraud case, dismissal should not be automatic once the District Court determines the rule has not been satisfied if the specific allegations make it likely that the defendant used interstate mail telecommunications facilities and that the specific information as to use is likely to be in the exclusive control of the defendants; and (2) the District court abused its discretion in dismissing the complaint without permitting further discovery." He further held: "District Court should not have dismissed, without further discovery, civil action under the Racketeer Influenced and

Corrupt Organization Act alleging mail fraud and wire fraud where plaintiff provided outline of general scheme to defraud and established inference that mail or wire fraud was used to transmit scheme; requiring plaintiff to plead time, place and contents of communication between defendants, without allowing some discovery in addition to interrogatories, was unreasonable. 18 U.S.C. §§1341, 1343, §1961(1)(B), §1962(b-d), §1964(c); Fed. R. Civ. Proc., Rule 9(b), 28 U.S.C. This court should review the above decision of the District Court as it appears Mitchell's case and the above captioned case were decided by the United States court of Appeals in conflict with each other in the same important matter. (3) Allows this court to settle an important question of federal law previously thought to be settled, however, due to the decision of the United States court of Appeals for the First Circuit affirming the decision of the District Court to deny Mitchell's motions to dismiss the motions of the defendants to dismiss Mitchell's complaint because of the defendants' failure to comply with local rule 7.1(a)(2) of the Federal Rules of Civil Procedure. The decisions of the above lower courts are not only in conflict with the holdings of this court in Carlisle v United States, (supra) but challenge the authority of the holdings of this court in the above cited case. In the above-cited case the justices of this court held that "federal courts have no more discretion to disregard the rule's mandate than they do to disregard constitutional or statutory provisions." The justices of this court further held that "whatever scope" of the power (referring to the inherent power on the District Court) it ends where the federal rules begin. Justice Scalia, on behalf of a majority of the justices of the United States Supreme Court stated: "district judges may regulate their practice in any manner consistent with federal law, these rules and local rules of the court. This court is requested to review the decisions of the lower courts in this matter and provide a decision, which will decide whether or not the lower courts should abide by the holdings of this court in their decisions. This will certainly decide a federal question that will affect the outcome of this case and cases in the federal courts being litigated at this time by thousands of litigants and provide the lower courts and

litigants with proper course of litigation and results they can depend on; (4) It will allow this court to decide an important federal question brought about because of a decision of the United States Court of Appeals in this case that conflicts with relevant decisions of this court concerning the same matter. In this case Mitchell is appearing pro se. In the report and recommendation of the district court, magistrate-judge Swartward states: "Mr. Mitchell is proceeding pro se and therefore, I am required to construe his pleadings liberally. See: Haines v Kerner, 404 U.S. 519, 520-21, 92 S.Ct. 595-96 (1972); Feliciano v Dubois, 846 F. Supp. 1033 (D.Mass. 1994)" Further on he states: "Reading Mr. Mitchell's complaint liberally, I find that plaintiff's complaint seeks relief for the following claims"; He lists each count and explains what each claim is for but purposely omits Mitchell's request for a T.R.O. He never construed the request for his T.R.O. liberally. If he had he would have construed it as a request for proper medical examinations to determine the extent of Mitchell's injuries which cause instant memory loss and blurry vision. In McGuckin v Smith, 974 F.2d 1050, 1060 (9th Cir. 1992) this court held that a medical condition can be classified as serious if it "significantly affects an individual's daily activities." In Strickler v Waters, 898 F.2d 1375 (4th Cir. 1993) the court held there must be evidence of a serious medical or emotional deterioration attributable to the challenged condition. In this case pain is not the cause of emotional deterioration rather the lack of knowledge of the medical issues in the future that may affect Mitchell's life because of denial of his request for medical examinations and care.

In Mitchell's case both the doctors and the technicians employed by CMSI told Mitchell they knew internal injuries may exist as a result of his fall but because of the cost involved they did not think anything would be done to correct his condition. In a written report, an employee, John McClintock, stated he was requested to do memory testing on Mitchell and he was refusing.

Documentation of this report and event is contained in docket #101. This constitutes deliberate indifference to

the medical needs of Mitchell. He knew of the risk of future harm.

The request for proper medical examinations and care should be allowed by virtue of the medical contract which provides for proper medical care including examinations to determine injuries and the cause of illness suffered by inmates residing under the care and custody of DOC in institutions operated by DOC. A liberal understanding of the denial of Mitchell's request for proper medical examinations and care as requested in the T.R.O. above is the denial of the medical care provided in the medical contract. It is apparent that "required to construe pleadings liberally" should be decided and defined by this court in its decision when it concerns a request for medical care. It should also be decided if the lower courts should be allowed to allow a medical provider, being paid by the state to provide the care the state is charged by law to provide to withhold medical care. The medical examinations and care requested were to eliminate the conditions affecting his daily activities; (5) It will allow this court the opportunity to determine if the United States Court of Appeals for the First Circuit has decided an important question of federal law that has not been, but should be , settled by this court and also allow this court to determine if the lower court erred in its decisions to deny defaults in this case because it was advised by its clerk that Mitchell did not properly reserve the defendants, Ajeena and Ct Corporation System when in fact he did properly reserve these defendants and filed proof o this reservice of process to the court but the clerk of court never filed the proof of the second service of process. The objections to the report and recommendation of Magistrate Judge Swartwood, although sent to the court in a timely manner were purposely never filed by the clerk of court. A return receipt signed by the officer of the district court that normally receives mail on behalf of the court shows the objections were filed in a timely manner. The filing of this document is pivotal. If no objections are filed to the magistrates report and recommendation within 10 days of receipt of the report and recommendation an appeal cannot be filed. This purposeful act of the clerk of the U.S. District Court was meant to keep

Mitchell from pursuing an appeal as the Appellate Court would not have jurisdiction to hear the appeal. Proof of proper service of process to Dr. A. J. Ajeena and Ct Corporation System has been filed; Service of Process in compliance with F.R.C.P. 4(c)(2)(A) as detailed in facts material to consideration of the fifth question commencing on page [8] of this petition and continuing through pages 9 and 10, ending on page 10. Proof of Dr. Ajeena's signature is substantiated by his signature on his medical report. Mitchell filed all papers and documents in the courts by mailing them certified mail, return receipt requested so as to be able to file proof of receipt of the documents by the courts and retain proof the documents were received by the courts in a timely manner for filing. Although fairplay is expected of the federal courts at least twice the district court signed for and received documents in a timely manner for filing but never filed the documents. The last page of the report and recommendation of Magistrate Judge Swartwood contained notification that objections to his report and recommendation must be filed in the court within ten days of receipt of receiving the report and recommendation. If the objections were not filed within 10 days the Appeals Court would not hear an appeal. The objections were mailed certified mail, return receipt requested in a timely manner. The return receipt was signed by an officer of the court indicating the document was received in a timely manner but to this day the document has never been filed. Objection to the hearing of Mitchell's appeal were filed by an assistant attorney general on behalf of Lemuel Shattuck Hospital stating the objections were never filed and the Appeals Court did not have jurisdiction to hear the appeal. The docket sheet from the district court shows many documents were filed weeks from the date the return receipt shows the documents were received. A return receipt filed in the district court shows Dr. Ajeena was properly reserved at his place of abode by a qualified person. Proof of service has been filed with the court but never docketed. This court is requested to review the decision of the lower courts. Examine the proof of service of process and allow Mitchell the defaults against Dr. A. J. Ajeena and Ct Corporation System. Mitchell spoke

personally to Dr. Ajeena at Lemuel Shattuck Hospital and received letters from at least two general agents, also process specialists at CT Corporation System at 2 Oliver Street, Boston, MA 02108, which stated they received service of process of the copies of the summons and complaint. This is a large corporation with offices in several cities in the United States dealing with service of process daily. They are among the nexus of persons and entities involved with each other in this civil action.

For the above reasons a Writ of Certiorari should be grated to this Petitioner.

28 U.S.C. §2403 may apply in this petition.

Respectfully submitted,
By the Petitioner, Pro Se

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